Supreme Court, U.S.
FILED
SEP 3 1993
OFFICE OF THE CLERK

No. 93-175

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

GEORGE L. MOTHERSHED,
Petitioner,

vs.

CARROLL GREGG,

and

GARY L. BROOKS,
Respondents.

Response to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Gerald E. Durbin, III,
Counsel of Record
Mark E. Bialick
Elizabeth J. Nevitt
Durbin, Larimore & Bialick
920 N. Harvey
Oklahoma City, OK
73102-2610
Phone: 405/235-9584
Attorney for Respondent

BEST AVAILABLE COPY

No. 93-175

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE L. MOTHERSHED,

Petitioner,

vs.

CARROLL GREGG,

and

GARY L. BROOKS,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case was originally filed in 1988[1]

---

[1]Petitioner first filed an action based upon the events which form a basis for the current action in 1987, case no CIV-87-2361-W. That case was dismissed by the District Court on October 12, 1988 due to Petitioner's conflicting sworn statements regarding his residency, made in order to establish diversity jurisdiction. When the case was dismissed, the District Court found that sanctions should be imposed, pursuant to Rule 11 of the Federal Rules of Civil Procedure, upon Petitioner for those conflicting sworn statements. On October 27, 1988, United States Magistrate, Robin J. Cauthron, imposed sanctions upon Petitioner in the amount of $80,793.65. These sanctions remain unpaid.

and stems from a dispute over an oil and gas lease. Petitioner[2] alleged that Respondent fraudulently induced him to transfer his interest in the lease to Respondent. At trial, the Court entered a directed verdict in favor of Respondent after the presentation of Petitioner's evidence. Judgment was entered in 1989.

In 1991, Petitioner filed a Motion to Vacate the Judgment under Rule 60 of the Federal Rules of Civil Procedure. Petitioner alleged that Respondent had committed fraud in procuring

---

Also, in another phase of this litigation, on November 22, 1989, Respondents were granted judgment against Petitioner in the amount of $27,571.75, representing attorney's fees incurred in defending against claims found to have been frivolous. This judgment also remains unpaid.

[2]Throughout this Brief, the parties will be referred to as they appear in this Court. Petitioner, George L. Mothershed, appeared as Plaintiff in the District Court and Appellant in the Tenth Circuit. Respondents, Carroll E. Gregg and Gary L. Brooks, appeared as Defendants at trial and as Appellees in the Tenth Circuit.

the Judgment. Because his motion was more than one year from the date of entry of the Judgment, Petitioner could not use Rule 60(b)(3) as a basis for his Motion, but had to rely upon the "savings" clause in Rule 60(b) which allows a court to "set aside a judgment for fraud upon the court." Fed. R. Civ. P. 60(b). This power of the court can be exercised more than a year after entry of a judgment.

As required, a separate hearing was held by the District Court to determine whether there was fraud committed by Respondent during the original trial in this case. The District Court stated that most courts considering this issue had determined that "perjury of a witness is not sufficient to set aside a judgment for 'fraud on the court'." See, Order of the District Court, attached hereto as Appendix A.[3] The District Court then concluded that

> "the alleged perjured testimony of the defendant

---

[3]Hereafter referred to as Appendix "A".

> [Respondent] does not rise to the level of 'fraud upon the court' and is not sufficient to set aside the judgment...."

Id.

Additionally, the District Court stated that, even if the alleged perjury of a witness falls within the scope of Rule 60(b) and can be considered "fraud upon the court," the judgment previously entered should not be vacated. Id. In order to be successful in setting aside a judgment under Rule 60(b), Petitioner "must show by clear and convincing evidence that there was indeed a 'fraud upon the court'." Id. After "carefully and completely" examining the trial transcript, the District Court found that the transcript did not clearly indicate that any perjury occurred. Id. Further, the District Court found insufficient evidence to support Petitioner's allegations that Respondent's counsel knew of, condoned and encouraged the perjury. Id.

Petitioner appealed the District Court's decision to the Tenth Circuit Court of Appeals. After reviewing the appellate record, the briefs of the parties, and the decision of the District Court, the Tenth Circuit agreed that the alleged perjury described by Petitioner "does not rise to the level of a fraud on the court so as to bring his claims within the savings clause of Rule 60(b)." See, Order and Judgment of the Tenth Circuit Court of Appeals, attached hereto as Appendix B.[4] Petitioner now seeks a Writ of Certiorari from this Court in order for this Court to review the decision of the Tenth Circuit.

ARGUMENT

The case presented to this Court is not one for which this Court should issue a Writ of Certiorari. This Court should only review and rule on an issue when it is ripe for review. Petitioner suggests that this Court should review the decision of the Tenth Circuit Court

---

[4]Hereafter referred to as Exhibit "B".

of Appeals in this case because the decision creates a conflict with the decisions of other circuits on the issue of whether perjury of a witness constitutes "fraud on the court," as that phrase is used in Rule 60(b) of the Federal Rules of Civil Procedure. Although a conflict between circuits is grounds for this Court to grant a Writ of Certiorari, no such conflict actually exists. Therefore, there is no reason for this Court to address the issue raised by Petitioner and no Writ should be issued.

The decision of the Tenth Circuit does not encompass any holding on the issue of whether perjury constitutes "fraud on the court." Rather, the Tenth Circuit held that the United States District Court properly found that the perjury alleged by Petitioner "does not rise to the level of a fraud on the court so as to bring his claims within the savings clause of Rule 60(b)." Because the decision does not hold that perjury cannot be fraud on the court, it

does not conflict with the law as set forth by any other circuit.

The opinion of the District Court does contain a finding that perjury of a witness does not rise to the level of fraud as required by Rule 60(b) to set aside a judgment without regard to time. However, the District Court went on to find that, even if perjury by a witness does constitute "fraud upon the court," the evidence fell short of establishing that such perjury occurred.

Additionally, the holding in the case relied upon by Petitioner in his argument that a conflict exists between circuit courts as to whether perjury constitutes "fraud upon the court" does not have anything to do with that issue. In Bullock v. United States, 763 F.2d 1115 (10th Cir. 1985), the Tenth Circuit held that the District Court had improperly vacated a judgment because all the information available in the action to set aside the judgment had also been available at trial. Id. at 1121.

On the issue of "fraud upon the court," the Court stated that, although a federal court has the power to set aside a judgment procured through fraud, the fraud must have been "directed to the judicial machinery itself and is not fraud between the parties...or perjury. Id. This was the Tenth Circuit's only reference to perjury as it relates to "fraud upon the court" as used in Rule 60(b). No perjury was alleged to have occurred during trial, nor did the question of whether perjury constitutes fraud on the court play any part in the Court's decision.

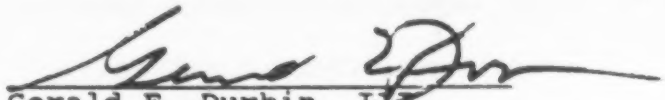
From a review of the Bullock decision, as well as the decisions of the District Court and Tenth Circuit in this case, it is clear that the Tenth Circuit has not specifically held that perjury cannot ever be considered "fraud upon the court" as that phrase is used in Rule 60(b). Because there has been no holding on that issue, there can be no conflict on the issue between the Tenth Circuit and other circuits.

Therefore, there are no grounds for this Court to issue a Writ of Certiorari to review the decision of the Tenth Circuit.

CONCLUSION

It has been said that this Court gives great weight to the fact-finding made by a District Court and which has been approved by a Court of Appeals. National Collegiate Athletic Association v. Board of Regents of University of Oklahoma, 468 U.S. 85 (1984). In this case, the fact-finding made by the District Court was approved by the Tenth Circuit. Petitioner has shown no reason for this Court to issue a Writ of Certiorari in order to review those decisions. No conflict exists between the Tenth Circuit's decision in this case or in Bullock. Therefore, no Writ should issue from this Court.

DURBIN, LARIMORE & BIALICK

By: 

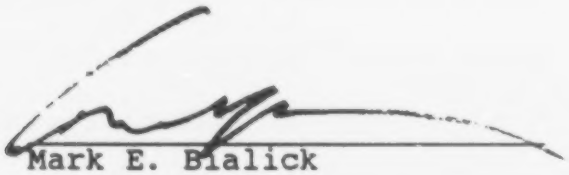
Gerald E. Durbin, III,
Counsel of Record
Mark E. Bialick
Elizabeth J. Nevitt
920 N. Harvey
Oklahoma City, OK 73102-2610
Telephone: 405/235-9584
Attorneys for Defendant
Brooks

CERTIFICATE OF MAILING

This is to certify that on this 4 day of Sept, 1993, a true and correct copy of the above and foregoing was mailed, postage prepaid, to the following named counsel of record, to-wit:

George L. Mothershed, Esq.
99 Almaden Blvd., Suite 640
San Jose, California 95113-1605
Plaintiff, pro se

Mr. Carroll E. Gregg
Joseph Harp Correction Center
P.O. Box 548
Lexington, Oklahoma 73051



Mark E. Bialick

1137\002-12

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Jamie Youngblood

GEORGE L. MOTHERSHED, Plaintiff,	)	
vs.	)	Case No. CIV-88-1504-W
CARROLL E. GREGG and GARY L. BROOKS, Defendants.	)	

ORDER

This matter comes before the Court upon the motion of the plaintiff, George Mothershed, pursuant to Rule 60(b), Fed. R. Civ. P., to vacate the judgment entered herein on September 28, 1989, upon a verdict directed by the Court in favor of the defendants, Carroll E. Gregg and Gary L. Brooks. In his motion, the plaintiff contends that the judgment, affirmed by the Court of Appeals for the Tenth Circuit, was obtained by "fraud upon the court." Specifically, the plaintiff alleges that the defendant, Gary L. Brooks, committed perjury on an issue central to the case. The defendant, Gary L. Brooks, has responded to the plaintiff's motion, and upon consideration of the parties' submissions, the Court makes its determination.[1]

---

[1]The defendant, Carroll E. Gregg, has not responded to the plaintiff's motion. The Court, however, declines to deem the motion confessed as to this defendant. As explained infra., the Court concludes that the motion is without merit.

Rule 60(b) sets the forth specific grounds upon which a party may be relieved from operation of a judgment. Rule 60(b)(3) specifically permits a court to relieve a party from a final judgment on the grounds of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." See, Rule 60(b)(3), Fed. R. Civ. P. However, in order to be relieved from judgment under Rule 60(b)(3), the party must file his motion within one year after entry of the judgment. Id. As previously stated, judgment, in the instant case, was entered in 1989. The plaintiff's motion was not filed until 1991. Consequently, the plaintiff may not seek relief from the final judgment entered in the instant case under Rule 60(b)(3). See, Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985).[2]

Rule 60(b) also recognizes the Court's inherent power to grant relief from a final judgment when fraud has been perpetrated upon it. The savings clause of Rule 60(b) states:

> "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court."

Unlike a motion under Rule 60(b)(3), a motion for fraud upon the court under the savings clause is not bound by a one-year limitation for filing. See, 7 Moore's Federal Practice § 60.33 at 355 (1991). In fact, a successful party may be relieved from a

---

[2]Plaintiff may also not seek relief under Rule 60(b)(2) on the basis of "newly discovered evidence" as Plaintiff's motion was filed more than one year after entry of the final judgment. See, Amstar Corp. v. Envirotech Corp., 823 F.2d 1538, 1550 (Fed. Cir. 1987).

judgment procured through fraud upon the court even though the movant has been guilty of laches. See, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). Because of the absence of a rigid time limitation and the "deep-rooted federal policy preserving the finality of judgments," the concept of "fraud upon the court" has been construed very narrowly. See, Williams v. Bd. of Regents, 90 F.R.D. 140, 142 (M.D. Ga. 1981). The principal concern motivating the narrow construction is that the nebulous concept of "fraud upon the court" could overwhelm the specific provision of 60(b)(3) and its time limitations. See, 7 Moore's Federal Practice § 60.33 at 356 (1991). Thus, "fraud upon the court" has been confined to the most egregious cases where the court or a member is corrupted or influenced or influence is attempted or where the judge has not performed his judicial function. See, Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir.), cert. denied, 474 U.S. 1086, 106 S.Ct. 862, 88 L.Ed.2d 900 (1986).

In the instant case, the plaintiff has alleged that the defendant, Gary L. Brooks, committed perjury while testifying during the trial of this case. Perjured testimony obviously interferes with a court's role in discovering the truth. However, the courts have consistently held that perjury of a witness is not sufficient to set aside a judgment for "fraud upon the court." See, Hazel-Atlas Glass Co., 322 U.S. at 245, 64 S.Ct. at 1000, Bulloch, 763 F.2d at 1121; Travelers Indem. Co., 761 F.2d at 1551; Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.) (per

curiam), cert. denied, 409 U.S. 883, 93 S.Ct. 173, 34 L.Ed.2d 139 (1972); Porcelli v. Joseph Schlitz Brewing Co., 78 F.R.D. 499, 501 (E.D. Wis.), aff'd without opinion, 588 F.2d 838 (7th Cir. 1978). To meet the standard of "fraud upon the court" one needs fraud which generally "involves far more than an injury to a single litigant." It is action which represents "a deliberately planned and carefully executed scheme to defraud" public institutions. See, Hazel-Atlas Glass Co., 322 U.S. at 245-6, 64 S.Ct. at 1000-1001; Addington v. Farmer's Elevator Mutual Ins. Co., 650 F.2d 663, 668 (5th Cir.), cert. denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981). The Court therefore concludes that the alleged perjured testimony of the defendant does not rise to the level of "fraud upon the court" and is not sufficient to set aside the judgment for "fraud upon the court."

Even if the alleged perjured testimony of the defendant would fall within the standard needed under Rule 60(b) to set aside a judgment for "fraud upon the court," the Court finds the judgment should not be vacated. In order to prevail on a motion to vacate a judgment for "fraud upon the court," the plaintiff must show by clear and convincing evidence that there was indeed a "fraud upon the court." See, Bulloch, 763 F.2d at 1121. Having carefully and completely examined the transcript of the trial proceedings in this case, the Court is not persuaded nor convinced that the defendant committed perjury as alleged by the plaintiff. The trial transcript does not clearly indicate that the defendant specifically stated that a bank officer named "Ken" threatened to

foreclose the mortgage upon the McClure oil and gas lease. The transcript does reveal testimony that the defendant talked with a bank officer named "Ken" and discussed the McClure lease. However, there is no testimony in the transcript that "Ken" specifically told the defendant that the bank was intending to foreclose the mortgage on the McClure lease or that "Ken" made threats that the bank would foreclose the mortgage on the McClure lease. Thus, the Court concludes that the plaintiff has failed to present clear and convincing evidence of a "fraud upon the court."

Finally, the plaintiff has made allegations in his motion that defendant's attorney knew about the alleged perjured testimony and was involved in the presentation of this alleged "fraudulent" testimony. The Court notes that involvement of an attorney in an attempt to suborn perjury has been suggested by some courts as sufficient to constitute "fraud upon the court." See, Great Coastal Exp., Inc. v. International Broth. of Teamsters, etc., 675 F.2d 1349, 1357 (4th Cir.) cert. denied, 459 U.S. 1128, 103 S.Ct. 764, 74 L.Ed.2d 978 (1983). However, the Court concludes that the plaintiff, in this case, has failed to present clear and convincing evidence of the defendant's attorney's knowledge and involvement in the presentation of the alleged perjured testimony. Furthermore, the Court has previously concluded that the plaintiff has failed to present clear and convincing evidence that the defendant committed perjury.

Accordingly, the plaintiff's Motion to Vacate Newly Discovered Evidence of Perjured Testimony of Gary L. Brooks, Defendant, is DENIED.

ENTERED this 17th day of January, 1992.

LEE R. WEST
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FILED
United States Court of Appeals
Tenth Circuit

FOR THE TENTH CIRCUIT

MAY 11 1993

ROBERT L. HOECKER
Clerk

FILED
MAY 13 1993

GEORGE L. MOTHERSHED,

Plaintiff-Appellant,

v.

CARROLL E. GREGG, GARY L. BROOKS,

Defendants-Appellees.

No. 92-6035
(D.C. No. CIV-88-1504-W)
(W.D. Okla.)

DOCKETED

ORDER AND JUDGMENT*

Before MOORE and BRORBY, Circuit Judges, and VAN BEBBER,** District Judge.

**Honorable G. Thomas Van Bebber, District Judge, United States District Court for the District of Kansas, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff George L. Mothershed appeals from the district court's denial of his motion to vacate judgment, filed pursuant to

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

150

Fed. R. Civ. P. 60(b). The judgment in question was entered on September 28, 1989, following the district court's grant of a directed verdict in defendants' favor. This court affirmed the judgment on appeal. See Mothershed v. Southwestern Bank & Trust Co., Nos. 89-6144, 89-6314 (10th Cir. Jan. 30, 1991)(unpublished decision).

Mr. Mothershed maintains the district court abused its discretion in denying his motion. See Campbell v. Bartlett, 975 F.2d 1569, 1580 n.15 (10th Cir. 1992)(this court normally reviews denial of Rule 60(b) motion for abuse of discretion). He contends that Mr. Gregg committed perjury during the civil trial which lead to the 1989 judgment. He asserts the perjury was so egregious that it requires the judgment be vacated. Defendant Gregg contends that this appeal is frivolous, and that sanctions are appropriate under Fed. R. App. P. 38.

We have carefully reviewed the record on appeal, as well as the parties' briefs and the district court's order. We agree with the district court that the perjury which Mr. Mothershed has described does not rise to the level of a fraud on the court so as to bring his claims within the savings clause of Rule 60(b). See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245 (1944); Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir. 1985), cert. denied, 474 U.S. 1086 (1986). Consequently, for the reasons stated in the district court's order, the judgment is affirmed.

This leads us to the issue of Mr. Gregg's request for sanctions. Fed. R. App. P. 38 authorizes this court to award

damages if we determine that an appeal is frivolous or brought for the purpose of delay. Braley v. Campbell, 832 F.2d 1504, 1510 (10th Cir. 1987). An appeal is frivolous when "'the result is obvious, or the appellant's arguments of error are wholly without merit.'" Id. (quoting Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 656 (9th Cir. 1984)(citation omitted)).

At the time Mr. Mothershed filed this appeal, it was absolutely clear that the perjury which he describes, even if true, would not constitute fraud on the court as that term has been judicially interpreted. See Hazel, 322 U.S. at 245-46; Bulloch, 763 F.2d at 1121; see also Great Coastal Express, Inc. v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 675 F.2d 1349, 1356 (4th Cir. 1982)(courts agree that fraud on the court should be construed very narrowly when applied, as here, under the savings clause of Rule 60), cert. denied, 459 U.S. 1128 (1983). Minimal legal research makes that abundantly clear.

In addition, Mr. Mothershed has not cited any authority which stands for the proposition that he, as a nonprevailing party to the judgment, was entitled to an evidentiary hearing in the district court prior to the court's consideration of the Rule 60 motion. Finally, there is nothing in the record to show the district court abused its discretion in staying discovery. It is apparent Mr. Mothershed simply wants to relitigate the issues decided in the 1989 lawsuit. Under these circumstances, allowing him to do so would severely undermine the integrity of the final judgment rule. See Bulloch, 763 F.2d at 1121 (unless party shows

fraud on the court through clear and convincing evidence, judgment should not be disturbed).

We agree with Mr. Gregg that sanctions pursuant to Fed. R. App. P. 38 are appropriate. We award as just damages the sum of $1,500 plus single costs. Mr. Mothershed shall make payment within sixty days of the date of this order and judgment. Mr. Mothershed's motion to correct his brief is GRANTED. His motion to expedite this appeal and his application for writ of Ne Exeat are DENIED as moot. The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

The mandate shall issue forthwith.

Entered for the Court

Wade Brorby
Circuit Judge